Supreme Court, U.S.
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No. 94-1765

In The

Supreme Court of the United States

October Term, 1994

INN OF MIAMI AIRPORT, INC.,

Petitioner,

vs.

PERREN-VIBES MUSIC, INC., POLYGRAM INTERNATIONAL PULBISHING, INC., MUSIC SALES CORP., FAMOUS MUSIC CORPORATION, GIORGIO MORODER PUBLISHING COMPANY, FUNKY METAL MUSIC, POLISH PRINCE MUSIC, BIG ELK MUSIC, FLYTE TYME TUNES, HIDEOUT RECORDS AND DISTRIBUTORS, INC. AGE TO AGE MUSIC, INC., EDWARD GRANT, INC. AND YELLOW ELEPHANT MUSIC,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF ON PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Respondents misstate the nature of the action and the issues raised on appeal before the Eleventh Circuit. Respondents state that the underlying copyright infringement action was brought on account of unauthorized public performances of the copyright owners' songs *by a disc jockey*. But the action was also brought on account of passive reception of licensed public broadcasts of music by a single radio receiver. The appeal did not address any count involving a disc jockey's playing of records. Petitioner contested on appeal only those counts based upon passive inadvertent reception of a licensed public radio broadcast. Petitioner contended that those counts should not have been held to be infringements under *Aiken;* and that the court erroneously foreclosed cosideration of a downward modification of damages awarded on those counts, given reliance on the homestyle exemption and a First Amendment right of access to news, commercial information, and musical compositions in the public domain.

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STATEMENT OF THE CASE

Respondents quote at length from the district court's order granting summary judgment, including the portion of the order that acknowledged that the issue of willfulness of infringement required further evidentiary hearing. It is precisely this acknowledgement that factual issues relating to the remedies to be awarded required resolution at trial that demonstrates the court's error in granting summary judgment.

Respondents also gratuitously insert reference to an unrelated copyright infringement action that was brought in Louisiana. *Jobete Music Co. Inc. v. Inn of Hammond, Inc.*, No. 91-2058 (E.D. La. Feb. 7, 1992). Reference to that case insinuates that it provided support for the judgment below, although Respondents fail to specify the nature of that support. However, the trial court's finding that no infringement had been willful (a factual issue specifically reserved for trial) refutes Respondents' insinuation. Moreover, the issues on appeal in this case relate to the radio counts, while *Jobete Music* addressed only the playing of records by a disc jockey and was not commenced until after the events of the instant case had occurred. Similarly, Respondents' reference to the action pending in the Southern District of Florida is meaningless, since that action is against a *successor* corporation and concerns events subsequent to those addressed below.

REASONS FOR GRANTING THE WRIT

I.

THE ELEVENTH CIRCUIT MISAPPLIED *TWENTIETH CENTURY MUSIC CORP. V. AIKEN* BY FAILING TO TEST ASSERTED FIRST AMENDMENT INTERESTS AGAINST INADVERTENT PASSIVE COPYRIGHT INFRINGEMENTS

Respondents propose that the decision in *Aiken* addressed no more than the definition of "performance" under the old copyright act. Respondents further state that Petitioner's argument that members of the public would be deterred from turning on a radio and thus suffer a chilling effect is "a novel one."

Petitioner need only refer the Court to its language in *Aiken* to demonstrate the falsity of both of Respondents' premises. This Court considered the *effect* of finding passive inadvertent reception to be susceptible to a determination of liability and described that effect as being highly inequitable:

> . . . [A] ruling that a radio listener 'performs' every broadcast that he receives would be highly inequitable for two distinct reasons. First, *a person in Aiken's position would have no sure way of protecting himself from liability for copyright infringement except by keeping his radio set turned off.*

Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 162-163, 95 S.Ct. 2040, 2047, 45 L.Ed. 84 (1975) (emphasis added). As is clear, this Court's concern was with the issue of liability under the act and with the chill that liability would cast upon all radio usage.

Thus, Petitioner's approach is neither novel, nor is this Court's prior decision as restricted as Respondents argue.

Respondents additionally argue that *Aiken* furnishes no ground of support for the innocence defense, since the district court *subsequently* determined that the equipment surpassed the "outer limit" of the homestyle exemption. This argument proves Petitioner's point that consideration of the homestyle exemption severed from a full evidentiary hearing on the issue of innocence will operate to discourage any reliance on that exemption and thus magnify the First Amendment chill.

A summary determination of the innocence defense "prejudices the inquiry and impedes arrival at the proper conclusion." *Harper, Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 594 (1985) (Brennan, J., dissenting). If alleged infringement is not innocent, it can hardly later be determined exempt, for the two findings are hopelessly inconsistent. The exact prejudice to the inquiry described by Justice Brennan is evident in the instant case.

Respondents next argue that the radio usage was not "incidental such as might accompany a news broadcast." Respondents state that a disc jockey played a radio station that broadcast for "disco" dancing. Respondents thus suggest that the nature of the broadcast *station* is a determinative factor in a finding of infringement. First, this argument misstates the record. There is no record that a disc jockey played the radio, only that a disc jockey later played records. Similarly, there is no testimony that there

was any dancing during the radio broadcasts, or that that station was dedicated to "disco" dancing.

Second, this argument misstates the issues before both courts. Petitioner contends that the court failed to articulate or apply *any* factors that might constitute an appropriate testing of the First Amendment rights as against the asserted copyright interests. This petition seeks this court's assistance in articulating such a test as was, at least implicitly, applied in *Aiken*. The homestyle exemption itself does not afford such a test as is required under the First Amendment, for courts have tended to focus solely upon physical details of sound equipment to the exclusion of other *Aiken* factors. Indeed, many courts regard the copyright revision to require such a restricted view of *Aiken*.

Finally, Respondents contend that because Congress intended to overrule the basis of *Aiken*, the First Amendment issues are moot. However, the lower court made no finding of "mootness." Such a finding would have been a determination that none of *Aiken's* pronouncements survived the copyright revisions. But no court has addressed this actual point – and this is the first point that Petitioner respectfully submits should be addressed by this Court: Does *Aiken* provide protection for passive reception of licensed public broadcasts on a single receiving unit that survives the 1976 revisions to the Copyright Act and that the Eleventh Circuit controverted by failing to apply a proper test for asserted First Amendment interests?

II.

THE ELEVENTH CIRCUIT IGNORED APPLICABLE STANDARDS OF REVIEW

The central error in Respondents' argument is the same as the error in the district court's determination of the summary judgment motion, and the circuit court's treatment of that issue on appeal. A course of conduct cannot constitute lack of innocence as a matter of law where the district court inconsistently acknowledges the existence of genuine issues of material fact regarding willfulness and the remedy to be awarded:

> Although a downward adjustment is unreasonable, the Court is unwilling to fix the damages from the parties' filings. Notably, the decision in *Rodgers* followed an evidentiary hearing. Considering the mixed record, the Court cannot determine whether the Inn acted 'willfully.'
>
> * * *
>
> . . . without an evidentiary hearing, the Court cannot determine the proper remedy for this infringement.

E-7-8. Nor can a subsequent second "finding" after trial somehow cure the error of having foreclosed the hearing of further evidence on that issue or possible downward modification of the damage award as justified by that evidence.

Respondents' argument next impossibly and irreconcilably states that the district court never made a determination of inadvertence as opposed to innocence, but that the district court "found" that the Inn's conduct was not innocent, but indifferent, on two separate occasions.

A "finding" or a "determination" by any other name is still an impermissible resolution of conflicting facts.

Finally, Respondents argue that Petitioner admits that case law supports summary disposition of the innocence issue. However, Petitioner makes no such admission. Petitioner's argument was quite the opposite: "Permitting summary disposition on innocence thus places a price tag on a good-faith submission of each defense to the trial court, even if case law supports it."

Petitioner's position remains as quoted. Severing issues of innocence from issues of willfulness, First Amendment rights, and applicability of the homestyle exemption, places a price tag on a good-faith submission of the exemption and First Amendment interests to the trial court. Even if case law supports application of the exemption, a later rejection of the exemption at trial leaves the Defendant stripped of the right to request a downward adjustment of damages and leaves the court stripped of discretion to refuse to award attorney's fees. Defendant thus must pay an onerous price. The price is simply too high to comport with the protections of the First Amendment that underlie the homestyle exemption and this Court's decision in *Aiken*.

CONCLUSION

Petitioner respectfully requests the Court to grant its Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit to reverse the judgment based upon excessive chill cast on First Amendment rights by application of the Copyright Act in the circumstances; or, alternatively to vacate the judgment, and to direct a remand for application of a proper First Amendment Test and full trial on the innocence defense.

Respectfully submitted,

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